Money Laundering:

the Portuguese experience and some issues raised by the Proposal for a Third EU Directive

Money laundering[1] **(**including the recycling of property or the disguising of property or rights, and all steps for their placement, layering and integration) aims at concealing profits from a primary crime, as well as all property related to such crime and illegally and intentionally appropriated, thus creating an apparent legitimacy with regard to all acquired or added ownership of property or rights with respect to it.[2]

Since at the origin[3] there is always a primary serious crime[4] and following it a money laundering crime, the aim is to anticipate criminal protection in view of the particular seriousness of the initial crime.

---

[1] Money laundering has already been designated as all *"the efforts of criminals to disguise the illicit origin of criminal proceeds"*, as referred in the *Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering, including terrorist financing* (hereafter, *Proposal for a Third EU Directive).* It is possible to view the document in its entirety *(com2004_0448pt01.pdf)* at the site of the European Union www.europa.eu.int.

[2] *For better knowledge of the topic of money laundering in Portuguese, see Jeffrey Robinson,* Os Branqueadores de Dinheiro, *Lisboa, Livros do Brasil, 1995; Cláudia Maria Cruz Santos,* O Crime de Colarinho Branco (da origem do conceito e sua relevância criminológica à questão da desigualdade na administração da justiça penal), *Coimbra, Coimbra Editora, 2001; Rodrigo Santiago,* O Branqueamento de Capitais e outros Produtos do Crime, *in Revista Portuguesa de Ciência Criminal, Ano 4 (1994); José de Oliveira Ascensão,* Branqueamento de Capitais: reacção criminal, *in Estudos de Direito Bancário, Coimbra Editora, 1999; Lourenço Martins,* Branqueamento de Capitais: contra-medidas a nível internacional e nacional, *in Revista Portuguesa de Ciência Criminal, Julho-Setembro 1999; Jorge Alexandre Fernandes,* Do Crime de Branqueamento de Capitais, *Coimbra, Almedina, 2001; Jorge Manuel Vaz Monteiro Dias Duarte,* Branqueamento de Capitais – o regime do D.L.15/93, de 22 de Janeiro, e a normativa internacional, *Porto, Universidade Católica, 2002; Luís Goes Pinheiro,* O Branqueamento de Capitais e a Globalização (facilidades na reciclagem, obstáculos à repressão e algumas propostas de política criminal*), in Revista Portuguesa de Ciência Criminal, Outubro-Dezembro de 2002; Jorge Dias Duarte,* Branqueamento de Capitais e Favorecimento Pessoal *(comentário a Ruling of the Supreme Court of Justice), in Revista do Ministério Público, n 90, Abril-Junho de 2002; João Davin,* Branqueamento de Capitais – breves notas, *in Revista do Ministério Público, n 91, Julho-Setembro de 2002; and Jorge Dias Duarte,* A Lei n.º 11/2004, de 27 de Março. O Novo Crime de Branqueamento de Capitais consagrado no art 368º-A do Código Penal, *in Revista do Ministério Público, n.º 98, Abril-Junho de 2004.*

[3] Initially, the scope for punishment of money laundering was quite limited. It was circumscribed to activities related to drug trafficking, and even later on did not move far beyond the money laundering of proceeds from drug trafficking. Initially, punitive action was also more relevant. And preventative action was circumscribed to the activity of the financial institutions. Nowadays preventative action is favoured at various levels. And nowadays also punishment of money laundering is much wider in scope. Indeed, and

The definition of crime and its punishment aim also to protect against contamination from the illegal economy and against unfair competition[5], and to maintain the credibility of and the trust in the institutions, including the commercial and financial institutions.[6]

Naturally, the aims of carrying out justice[7]; protecting democracy and safeguarding the structures of the State itself and the obvious, though unavowed, interest of the latter in the confiscation of the proceeds of crime are to be taken into consideration as well.[8]

---

much beyond the crimes of drug trafficking, terrorism, weapon and nuclear product trafficking, extortion, kidnapping or exploitation and human, organ and human tissue trafficking, and so on, a general clause has been established which sets forth the punishment of money laundering, not precisely that which is based on *"offences generating «substantial proceeds»"* but when related to any offence which is *"punishable by a severe sentence of imprisonment".* Still, in the various legal frameworks of the European Union, there are abysmal differences.

[4] *For a definition of serious crime, see* Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime.

[5] *See the content of the Ruling of the Supreme Court of Justice of 20-06-2002 in case no. 472/02:* "I-The author of a trafficking crime may commit, together with the primary crime, a money laundering crime. In fact, the definition of a crime in both cases aims at protecting distinct realities. II- Thus, the criminalization of drug trafficking aims, above all, to protect the community's public health and, and consequently, or rather in parallel, the (physical and psychical health) of all and every one of the members of the community.. III- In turn, the crime of money laundering aims, inter alia, to protect the "health of the financial, economic and legal circuit within that same community, aiming thus to shield it from «contamination» derived from the flux, to its flow, of goods of criminal origin which seek to gain legitimacy therein. Such goods may tend to be reinvested later on, bringing about new means for enrichment which strengthen the criminal entities which provide the money-laundered goods and are, at the same time, liable to put the principle of free competition itself into jeopardy*".*

[6] *One must not forget that one are faced with serious criminal activity which puts into jeopardy diffuse interests, under apparent normalcy and with growing creative spirit, diversity and novelty in action, behaviour, contexts or circumstances, and true opacity and complexity in the methods. All this creates the potential for latent conflict as well as privacy barriers; brings about diffuseness in victimization and dispersal or confusion in terms of accountability, leading therefore to difficult enforcement of repressive measures.*

[7] *See the content of the Ruling of the Supreme Court of Justice issued in 23-03-2000 within case no. 972/99. It was decide therein that* "the offenders under Article 23 of Decree-Law no. 15/93, de 22-01 – on the conversion of property derived from the criminal activity of drug trafficking– shall not be the traffickers themselves but those who, by means of legally defined aims, convert, transfer or conceal property derived from trafficking, either through connivance or by taking advantage a posteriori of the situation. This definition as a crime aims ultimately at the continued consequences of trafficking, through the activity of agents, and not at the traffickers*"*

[8] *As has been said already, money laundering is a serious crime and one highly harmful for society. The capacity to detect, investigate and repress such illegal activities is still incipient, highly difficult and with no significant results, either within companies or state authorities — which gives rise to a particularly serious risk factor in companies whose dimension and degree of complexity allow for generalized or isolated conducts from their officers or representatives; and imposes the adoption of precise individual*

The short **history of money laundering in Portugal** has gone through two distinct, clear-cut phases, one prior to[9] and the other following[10] the enactment of the second Directive, and has been primarily the result of a drive in international legislation[11] to lay it down and not of the pre-established and enlightened will of national lawmakers.

We call your attention, first of all, to the new provision under Article 368-A of the Criminal Code[12].

---

rules of conduct and clear general regulatory norms, as well as strict audit and checking procedures, in order to prevent illicit action and to make it possible, in case of infringement, to hold perpetrators and only they accountable, to the extent of their accountability.

[9] At the beginning rules were established which did not in any way clash with the profession and the function of the lawyer, at least as such. It was the case in the following national laws, which have been repealed already: Decree-Law no. 15/93, of 22 January; Decree-Law no. 313/93, of 15 September; and Decree-Law no. 325/95, of 2 December, which was amended in turn by Law no. 65/98, of 2/9; by Decree-Law no. 275-A/90, of 9/11; by Law no. 104/2001, of 25/8, by Decree-Law no. 323/2001, of 17/12, and by Law no. 10/2002, of 11/2.

[10] *At the present moment Law no. 11/2004, of 27/3, is in force, in the wording established under the Rectifying Declaration no. 45/2004, of 5/6, and with the amendments introduced by Law no. 27/2004, of 16/7. This is the current national legal framework. It clashes directly with lawyers and their practice. We shall see how. And, above all, to what extent.*

[11] *Namely, the* United Nations Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances *(1988); the* Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141 – 1990); *and the Directives of the Council 91/308/CEE, 10/6/1991 and of the European Parliament and the Council 2001/97/CE, 4/12/2001. These are called the First and Second Money Laundering Directives.*

[12] *Which establishes, for the first time within the Criminal Code, and not in random legislation, the following:*

"1 – For the purpose of the following provisions, one shall consider as advantages i) the proceeds originating in the commitment, under whatever form of association, of the typical illicit acts of incitement to prostitution, sexual abuse of children or dependent minors, extortion, drugs and psychotropic substances trafficking, arms trafficking, organs and human tissues trafficking, protected species trafficking, tax fraud, traffic of influences, corruption and all other offences referred to under Article 1(1) of Law no. 36/1994, of 29 September, and of typical illicit acts punishable with imprisonment for a minimum term of more than 6 months or a maximum term of up more than 5 years, ii) all goods obtained through them.

2 – Whoever converts, transfers, aids or facilitates any transaction of conversion or transfer of an advantage, by himself or through a third person, directly or indirectly, in order to conceal its illicit origin, or to help the person who participated in these offences avoid criminal pursuit or criminal consequences, shall be punished with a penalty of imprisonment from 2 to 12 years.

3 – Whoever conceals or disguises the true nature, origin, location, iter, movements or the holding of advantages or rights related to it, shall be punished with the same penalty.

4 – Punishment for crimes under (2) and (3) above shall occur regardless of whether the acts which form the underlying offence have taken place outside national territory, or even where the location of the commitment of the act or the identity of the perpetrators is unknown.

And, above all, we signal out the importance of Articles 2,[13] 3,[14] 20,[15] 29[16], 30[17], 32 f),[18] 50[19] and 51[20] of **Law no. 11/2004, of 27 March**.

---

5 – The fact is not punishable when the criminal proceeding related to the typical illicit acts from which the advantages derive are dependant on a complaint and such complaint has not been submitted in due time, except where the advantages derive from typical illicit acts under Article 172 and Article 173.
6 – The penalty under (2) and (3) is increased by one third where the perpetrator commits such acts as usual conduct.
7 – The penalty shall be especially reduced in case of full repair to the offended of damages due to the typical illicit act from which the advantages derive, where no illegitimate damage from a third party occurs, and up to the beginning of the judgement phase at the lower court.
8 – Should the conditions under (7) above occur, the penalty may be especially reduced in case of partial repair.
9 - The penalty may be especially reduced where the perpetrator effectively helps to gather decisive evidence in order to identify or seize those responsible for the typical illicit acts from which the advantages derive.
10 – The penalty applied in accordance with the above provisions may not exceed the upper limit of the highest penalty from amongst those impending upon the typical illicit acts from which the advantages derive.*"*

[13] *This Article sets forth that* "the entities under this law shall be bound by the following duties: a) duty to require identification; b) duty to refuse transactions; c) duty to keep documents; d) duty to examine; e) duty to communicate; f) duty to abstain; g) duty to cooperate; h) duty to keep secrecy; i) duty to create mechanisms of control and training."

[14] *This article, in turn, sets forth that*
"1- The duty to require identification consists in imposing the requirement to identify customers and their representatives, who shall submit a valid proving document with a photograph, and including the name, place and date of birth; for collective persons, such identification shall be conducted through a copy of the identity card of the collective person.
2- Whenever there is knowledge or grounded suspicion that the customer does not act on his own behalf, it shall be necessary to obtain from customer all the information on the identity of the person on whose behalf he actually acts.
3- Where the duty to identify depends upon the transaction or the transactions, related or liable to be related amongst themselves, attaining a certain amount, and the full amount of the transaction or transactions is not known initially, the identification shall be carried out as soon as such amount is known and it is verified that such amount has been attained.
4- In distance transactions of an amount equaling or exceeding € 12 500 which do not derive from a contract for services, no transaction shall be carried out and no business relationship shall be initiated as long as the entity involved is not assured of the real identity of the customer by the means which appear the most adequate and which are defined as such by the supervisory authority of their sphere.
5- Where the transactions, whatever their amount, appear as likely to be related to the crime of money laundering, due namely to their nature, complexity, unusual character with regard to the activity of the customer, the amounts involved, their frequency, the economic and financial situation of the participants and the means of payment used, the entities subject to the duty to identify shall have the special duty to take all adequate measures in order to identify the customers and, if necessary, the representatives or other persons who act for the former."

[15] *This article establishes that* "what is set forth in this subsection is applicable to the following entities: a) companies acting under a concession granted in order to operate games in casinos; b) acting as real estate agents and as purchasers of real estate with a view to re-selling it; c) paying premiums of bets and lotteries; d) merchants of high single value goods; e) registered statutory auditors, official accounting auditors and external auditors, as well as fund transporters and tax consultants; f) companies, notaries,

registrars, lawyers, solicitors and other independent professionals, who intervene or assist on behalf of a customer or under other circumstances, in transactions involving: i) the purchase and sale of immovable goods, commercial establishments and company shares; ii) the management of funds, movable assets or other assents belonging to customers; iii) the opening and management of bank accounts, savings and mobile assets; iv) the creation, exploration or management of companies, trust funds or analogous structures; v) financial and real estate, in representation of the customer; vi) the transfer or the acquisition of rights over professional sport players."

[16] *This article sets forth that* "the lawyers and solicitors who intervene for a customer, or who render him assistance with regard to transactions under Article 20(f), shall identify their customers and the object of contracts and transactions whenever involved amounts equal or exceed € 15.000*."*

[17] *This article sets forth that:*

"1- In carrying out the obligation to communicate under Article 7, the entities referred to in Article 20, to the exception of lawyers and solicitors, shall inform the Prosecutor-General of any transactions which substantiate, suggest or bring about the suspicion of the commitment of a money laundering crime as soon as they know of it.

2- With respect to the lawyers or solicitors, the communication for the purposes of the above provision shall be carried out to the President of the Law Bar Association or to the president of the Chamber of Solicitors, respectively.

3- In the case of lawyers or solicitors, and where transactions under Article 20(f) occur, no information is to be sent as under the above provisions, where such information has been obtained in the context of the assessment of the legal situation of the customer, within any legal consultation, in the performance of his mission to defend or represent the customer in judicial proceedings, or with respect to judicial proceedings, including counselling relating to the manner through which to propose or avoid proceedings, and whether the information is obtained before, during or after the proceedings.

4- The entities referred to in the final part of (2) shall, in their turn, send the communication to the Prosecutor-General if they consider that it is justified, as under (1), and that the circumstances under the above provision do not occur.

5- That which is set forth in (3) and (4) is applicable also to the carrying out by lawyers and solicitors of their duties to refrain and cooperate as under Articles 8 e 9. These professionals shall,, within their duty to cooperate, communicate this to the Law Bar Association or to the Chamber of Solicitors, by providing them with the required elements for the purposes of (4), as soon as their assistance is requested by the judicial authority*."*

[18] *This article in (f)(1) establishes that* "the supervision of abidance by the duties under the above articles is pertains *(...) f*) to the Law Bar Association, in the case of lawyers*..."*

[19] *This article sets forth that*:

"1-Infringement by any lawyer of the duties which impend upon him in accordance with this law implies disciplinary proceedings to be initiated by the Law Bar Association in the general terms, in accordance with the Statute of the Law Bar Association.

2- The applicable disciplinary penalties as well as the criteria for applicability are those under the Statute of the Law Bar Association.

3- In applying penalties and in estimating the measure and grading of the penalty, the seriousness of the infringement of duties impending upon lawyers under this law shall be taken into consideration, taking as reference the criteria for grading established in Articles 45 e 46*."*

[20] *It is regulated under this article that:*

"1- The infringement by any solicitor of any of the duties impending upon him in accordance with this law shall imply the opening of disciplinary proceedings by the Chamber of Solicitors in the general terms, as under the Statute of the Chamber of Solicitors.

2- The applicable disciplinary penalties are: a) a fine of between € 500 and € 25.000; b) suspension of up to 2 years; c) suspension for more than 2 and up to 10 years; d) expulsion.

3- In applying penalties and in estimating the measure and grading of the penalty, the following aspects shall be taken into consideration: a) the seriousness of the infringement of duties impending upon

The lawyer is now under certain **special obligations**[21].

In a nutshell, and making it short, the lawyer is under the **obligation to identify his customers**, *i.e.* to verify, keep a record of, and preserve the identity of the latter; and, for our purposes, under the **obligation to report suspicious transactions**[22], *i.e.*, to denounce suspicious transactions or transactions which may suggest money laundering.

This obligation is, however, not applicable to all transactions[23] or under any circumstances[24], as we shall see, in view of the need not to put *one of the basic deontology principles for lawyers in their practice* into jeopardy.

To what extent[25] do such duties, as they are drawn out, not clash with the deontology inherent to the profession, with the legal rules and the basic ethic principles in legal practice by lawyers?

This is the fundamental issue at present.

The lawyer is under the obligation to keep professional secrecy[26] with respect to all facts he gains knowledge of as a result of his duties or services rendered, as under Article 87 of the Statute of the Law Bar Association.[27]

---

solicitors, taking as reference the criteria for grading established in Articles 45 e 46, b) the criteria laid down in Article 145 of the Statute of the Chamber of Solicitors.*"*

[21] *From now on, we shall always mention the lawyer but we shall always be bearing in mind both the lawyer and the apprentice lawyer. We must not forget that assistants are also subject to confidentiality and do not even have any special duties. This is the opposite of what happens with solicitors, who abide by rules similar to those of lawyers.*

[22] *One should not confuse suspicious transactions and doubtful transactions. Doubtful transactions may imply a more thorough examination. Only suspicious transactions may be the target of a claim, obviously in the case of legitimate denunciation.*

[23] *The transactions which are under scrutiny,* i.e. *those which are subject to the obligation to identify and the obligation to report, are typified and therefore strictly defined.*

[24] *And not all typified transactions can or should be subject to the obligation to report.*

[25] *See the contradictory content of the Opinions of Armindo Ribeiro Mendes and Augusto Lopes Cardoso, our illustrious President of the Law Bar Association, still with respect to the Second Directive; as well as the paper of Alfredo Castanheira Neves, presented during the Second Portuguese-Spanish Meeting of Young Lawyers.*

It must be reminded that *"the obligation of professional secrecy*[28] *applies to services required or handed over to the attorney irrespective of whether these involve judicial or extrajudicial*

---

[26] "The duty to keep professional secrecy is a golden rule in the legal practice by lawyers and one of the most sacred deontological principles. It has always been a point of honour and of the nature of this profession, a "condition sine qua non of its full dignity". The customer, or mere consultant, must have absolute confidence in the discretion of the Lawyer so as to be able to reveal all the truth to him, and to consider him as a never-opening "sesame". Other professionals (doctors, journalists, priests and banking staff) are bound by confidentiality, but in no other profession is that relationship of trust as strong as in ours (...) The ethical and legal basis for professional secrecy is rooted upon the principle of trust and upon the social nature of the judicial function (...) But there is still another ground for it, of obvious public interest, and directly related to the role of the Lawyer as a server of Justice*". – António Arnaut, Iniciação à Advocacia – História-Deontologia – Questões Práticas, p. 65 e seguintes, 5ª Edição, Coimbra Editora, 2000.*

[27] Article 87 of the Statute of the Law Bar Association, recently published under Law no. 15/2005, of 26 January, very clearly refers that:

"*1- The lawyer is obliged to hold professional secrecy with regard to all facts he gains knowledge of through carrying out his functions or rendering his services, namely: a) to facts relating exclusively to known professional matters, as a result of disclosure by the customer or by his order; b) facts he gains knowledge of as a result of some position he holds at the Law Bar Association; c) to facts relating to professional matters communicated by a fellow lawyer with whom he is associated or to whom he renders cooperation; d) to facts communicated by a perpetrator, a defendant or an interested person who stands jointly in the proceedings with his customer or his representative; e) to facts which the party in opposition to the customer or their representatives have informed them of during negotiations for an agreement aiming at ending the dispute or litigation; f) to facts he has gained knowledge of within the scope of unsuccessful negotiations, either oral or in writing, in which he may have intervened.*

2- The obligation of professional secrecy exists whether the service requested from or impending upon the lawyer involves judicial or extrajudicial representation or not, and whether it must be paid or not, whether the lawyer has accepted and carried out the representation or service or not. The same is applicable to all lawyers who, directly or indirectly, have some form of intervention in the service rendered.

3- Professional secrecy also contemplates documents or other things which may relate, directly or indirectly, with the facts under confidentiality.

4- The lawyer may disclose facts under professional secrecy, as long as that is absolutely necessary to defend the dignity, the rights and legitimate interests of the lawyer himself or of the customer or his representatives, through prior authorization from the president of the relevant district council. There shall be an appeal to the President of the Law Bar Association, in the terms of the relevant regulation.

5- The acts carried out by the lawyer in violation of professional secrecy have no validity as evidence in court.

6- Even where exempted to under the terms of (4), the lawyer shall be allowed to hold professional secrecy.

7- The duty to hold confidentiality in relation to the facts under (1) extends to all persons who cooperate with the lawyer in carrying out their professional activity, with the consequence under (5).

8- The lawyer shall require the persons referred to in the above provision to fulfill the duty set forth therein prior to the beginning of the collaboration."

[28] "Professional secrecy is not a right but a legal obligation of the lawyer. The obligation of professional secrecy is not established for the direct benefit of any one of the customers, as it impends upon the lawyer even against the will and interest of his customer. The obligation of professional secrecy is a public order duty, and shall only yield in exceptional cases contemplated in the law *(...)" – Opinion of the General Council no. E-14/02, approved on 12.4.2002, and drafted by rapporteur Jaime Medeiros.*

representation, of whether payment is due, and of whether the lawyer has accepted and carried out the representation or the service"[29].

It is a fact indeed that, in accordance with Article 114(1) and (3)(a) of the Organization Law of Legal Courts, enacted by Law no. 3/99, of 13 January, which amended Law no. 38/87, of 23 December, "*...lawyers are granted all necessary immunities to carry out their functions and legal representation is regulated as an essential element for the administration of justice*" and that "*lawyers are granted all necessary immunities in order to carry out efficiently their powers of representation through the legal recognition and guarantee that they shall used in an effective way, namely by means of the right of protection with regard to professional secrecy*"[30].

The lawyer has a strict **obligation of absolute reservation**[31], and therefore is not obliged to communicate, is exempt from the obligation to participate, or does not have the duty to report, quite to the contrary[32], in any of the following situations:

---

[29] *The Code of Conduct for Lawyers in the European Union is also very clear in this respect, as we can see:*
2.3. Professional secrecy
2.3.1. It is of the essence of a lawyer's function that he should be told by his client things which the client would not tell to others, and that he should be the recipient of other information on a basis of confidence. Without the certainty of professional secrecy there cannot be trust. Professional secrecy is therefore a primary and fundamental right and duty of the lawyer. The lawyer's obligation of professional secrecy serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the State.
2.3.2. A lawyer shall respect the professional secrecy of all information that becomes known to him in the course of this professional activity.
2.3.3. The obligation of professional secrecy is not limited in time.
2.3.4. A lawyer shall require his associates and staff and anyone engaged by him in the course of providing professional services to observe the same obligation of confidentiality.

[30] "The lawyer, in his function as defender of interests of others and as conduct counsellor, is a receptacle of countless secrets, which he has the obligation to keep religiously. The welcoming of secrets and the obligation to keep them are conditions for carrying out the profession itself. *[It can be said]* that the institute of professional secrecy is an integral part of the nature of the lawyer's mission. It can therefrom be concluded that, where no secrecy exists, the lawyer's profession does not either*". See Valério Bexiga, Manual de Deontologia Forense, Faro, Conselho Distrital de Faro da Law Bar Association, 2003.*

[31] "*As it has been written every time the bodies of this Bar Association are called upon to lay out their opinion* on the grounds and the extent of this legal instrument. If the right of the Lawyer to keep for himself or only for himself the knowledge of everything the customer trusted him with, directly or through third persons, were not recognized, or if he was not obliged to withhold the information obtained within his powers of representation, then there would be no real legal activity of lawyers. Professional secrecy is the normative armour, the unassailable legal guarantee against the temptation to obtain a

1. where he has obtained information in the context of an evaluation of the legal situation of the customer, or within the framework of legal consultation, including advice as to the means to propose or avoid proceedings[33], and
2. where he carries out his mission to defend or represent the customer in judicial proceedings, or with respect to judicial proceedings, and irrespective of whether information is obtained before, during or after[34] the proceedings.

This means that, where the lawyer acts as such, where he carries out **acts which are inherent to the legal practice**, as defined under Law no. 49/2004, of 24 August[35], he is not obliged to communicate or report, not even to the President of the Law Bar Association.

---

confession through a mediator and against the violation of the right to intimacy. It is the guarantee of the existence of a legal activity of lawyers, which, in order to be authentic, must be free and independent*" – Opinion of the Lisbon District Council no. 2/02, approved on 6.2.2002, and drafted by rapporteur José Mário Ferreira de Almeida.*

[32] "Word is silver; Silence is gold. If it is not convenient, do not do it; If it is not true, do not tell it, for to the depths of our conscience only we have access*" - see Valério Bexiga, Manual de Deontologia Forense, Faro, Conselho Distrital de Faro da Ordem dos Advogados, 2003.*

[33] *The expression used is "*proceedings*", and not "*judicial proceedings*", which allows for a very wide interpretation exceeding even that of "*punitive proceedings*", including disciplinary proceedings, proceedings for minor offences or criminal proceedings. The material scope of the exemption is thus wide. And all-encompassing, if one bears in mind that the expression* legal consultation *is not even restricted in the least to the* counselling relating to the manner through which to propose or avoid proceedings.

[34] *The exemption is not circumscribed, therefore, to the proceedings or to what may refer to the proceedings. It extends before and after, it is not restricted to the period "during" the litigation. That is, the time scope of the exemption is also expanded or, rather, not limited.*

[35] The three first articles are to be read carefully:

Article 1

Acts intrinsic to lawyers and solicitors

1- Only holders of a law degree who are currently enrolled at the Law Bar Association and solicitors enrolled at the Chamber of Solicitors may carry out acts which are intrinsic to lawyers and solicitors.
2- Legal consultation may also be carried out by holders of a law degree recognized to have merit and holders of master's degrees and Ph.D.'s whose degree is recognized in Portugal, and are enrolled for the purpose at the Law Bar Association under the terms of a special procedure to be defined at the Statute of the Law Bar Association.
3- The drafting of written opinions by teaching staff at the law faculties is an exception to (1).
4- It is possible for non holders of a law degree to carry out acts which are intrinsic to lawyers and solicitors within the powers under Article 173 C do Statute of the Law Bar Association and Article 77 do Statute of the Chamber of Solicitors.

It may, however, be discussed and inquired whether the lawyer is not obliged to report suspicious transactions in the course of the drafting of contracts or of the carrying out of preparatory acts leading to their coming into force, to changes to their clauses or to their cessation? We believe not.

Up until any suspicion has arisen, the lawyer is considered to be acting within the framework of his legal consultation and is therefore exempt from the obligation to report.

5- Notwithstanding that set forth in procedural laws, the following are acts inherent to lawyers and solicitors:
   a) The carrying out of the judicial mandate;
   b) Legal consultation.
6- The following are also acts inherent to lawyers and solicitors:
   a) The drafting of contracts and the carrying out of preparatory acts aimed at creating, changing and extinguishing legal acts, namely those carried out at registry offices and notary offices;
   b) The negotiation for collection of credits;
   c) The carrying out of the mandate through claims and complaints against administrative or tax acts.
7- Those acts which, in accordance with the above provisions, are carried out on behalf of third parties and within the professional activity, are considered as acts inherent to lawyers and solicitors, notwithstanding inherent powers attributed to all the other professions or activities whose access or practice is regulated by law.
8- For the purposes of the above provision, acts carried out by legal representatives, employees, officers or agents of individual or collective persons, as such, are considered not carried out on behalf of third parties, except where, in the case of collection of debts, the latter is the main object or activity of these persons.
9- All those acts deriving from the right of citizens to be accompanied by lawyer in addressing any authority are also acts inherent to lawyers.
10- In the cases where the criminal procedure determines that the defendant receive assistance from a defender, such function shall necessarily be carried out by a lawyer, in accordance with the Law.
11- Practice of the judicial mandate for legal consultation by solicitors is subject to limits from their statute and procedural legislation.

Article 2
Judicial Mandate

Judicial mandate is considered to be the judicial mandate given for action at any court, including tribunals, arbitral committees and justices of the peace.

Article 3
Legal Counselling

Legal counselling is considered to be the activity of legal counselling consisting of the interpretation and application of legal norms through the request from a third party.

From the moment any suspicion has arisen, the lawyer is obliged to refuse carrying out an act, and to refrain from counselling[36], or else he shall be considered as participant in the crime of money laundering, either as a perpetrator or as an accomplice.

In contrast, lawyers are not and may not be exempted from the duty to report suspicious transactions, when they act, not as lawyers[37], but only as:

1. economic of tax advisors, where services related to counselling, legal representation or defence are not considered;
2. the person in charge or, rather, the person member of an administrative body or entitled with the management of a company, namely as the representative of an off-shore; or
3. company holder or as citizens.

Still, considering their personal entitlement as lawyers, they shall be under the obligation to report any suspect transactions, regardless of any acts practised by them as part of their working activity, to their President of the Law Bar Association[38], who shall be sole and final judge of the situation[39].

---

[36] *Except obviously to dissuade the customer from committing the crime.*

[37] From this one shall distinguish, as we saw above, and with no need to take a specific approach or one distinct form general criminal theory, the commitment of acts which form the money laundering crime in any of its forms by the lawyer, as either moral or material perpetrator or accomplice. Even so, there are specific rules, namely of a criminal procedure nature, for instance with respect to means for obtaining evidence – *e.g.* the special rules on searches and confiscations at a laywer's office (Articles 177(3) and 180 of the Criminal Procedure Code).

[38] And not to the Prosecutor-General (who delegated such powers onto the Central Department of Criminal Investigation and Prosecution – DCIAP), as usually happens with other professionals, in carrying out other activities or within other institutions.

[39] *We are not unaware of the fact that a procedural issue emerges as to what should be the behaviour of the President of the Law Bar Association whenever he receives a report of a transaction suspected to involve money laundering. Two hypotheses arise. The first is that the President of the Law Bar Association shall decide, from his high standard, whether he should immediately communicate that suspicion or not or, in case of doubt, whether he should check as to the existence or not of the conditions for the obligation. The second is that the President of the Law Bar Association shall have to initiate, before the President of the competent District Council, the normal procedure for authorizing the disclosure of facts under the duty to hold professional confidentiality, as derives from Articles 51(1)(m) and 87 of the Statute of the Law Bar Association approved by Law 15/2005, of 26 January. This is a subject matter which should, possibly, be dealt with in the Regulation to which reference is made in the final part of Article 87(4) mentioned above. A significant practical difficulty shall therefore occur, which is that of knowing who shall be given powers to decide at an appeal level.*

As far as I understand, confidentiality is, for now, fully ensured in Portugal. But shall it also be in the future?

It has been said that, *following 11 September and 11 March, in New York and Madrid respectively, the world has changes; and, where the world changes, Law necessarily changes too*.[40] But shall it have to change for the worse?

It is accepted that **fighting money laundering**, namely through preventative and persuasive measures, as well as prudential measures, may be one of the most effective ways of suppressing criminal activity in its most serious and organized form[41], as well as of avoiding and chasing the typologies, tendencies and patterns in money laundering activities[42].

There is a growing tendency to emphasize security concerns and to stress draconian sanctionary measures. There is still also a need to work towards an approximation of laws[43]. Yet, and in spite of all this, we cannot accept the adoption of a real criminal law of the

[40] *To the extent that it is said that a transition from a State of legal democracy to a State of exception is occurring and that there is a* "...polluting effect over the whole criminal system, which recognizes the priority of procedure over law, and leads to the subversion of the norm insofar as exceptions become the rule. And that is why, by the range and permanent character of the exceptions of the law, this State of exception replaces the State of (substantive) Law, creating a State of non-law, of puré violence in the legal sphere" – *see Germano Marques da Silva*, Da «Processualização» do Direito Penal à Responsabilização dos Agentes da Justiça in *Direitos do Homem – Dignidade e Justiça*, Lisboa, *Principia, 2005, pp. 85 e 86. We shall say that neither the "*proceduralization*" of Criminal Law shall prevail over fundamental principles; nor the "*accountability of justice agents*" shall possibly impose anti-natural or deviant rules.*

[41] *And I have nothing against the proclaimed intention that* "...the range of criminal activity underlying the definition of money laundering should be expanded in order to include the fight against terrorism and terrorist financing" – see Consideration (8) of the Proposal for a Third EU Directive.

[42] *See content of the* 2003 Criminal Police Finance Information Unit Report *(the 2004 one has not yet been drafted or, at least, published up to 26 April 2005), in which typology lists are indicated, amongst which one refers, in short, cach deposits, Money couriers, Exchange transactions, electronic transfers, alternative systems of fund remittance, transactions with the resource to credit or transfers, transactions in the insurance sector and transactions through off-shores.*

[43] *See at the site* www.oa.pt *the* Report of the Commission, *based on Article 6 of the* Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime.

enemy[44], even given the growing expansion of the exceptions to the rules of the criminal law of guarantees[45] and that it shall therefore be fought fiercely.

As if there were first rate and second rate crimes[46] or first and second rate citizens, or, worse, citizens with rights, true holders of procedural rights, and non-citizens, mere objects in the procedure and therefore not holders of rights but agents subject to the procedure.

It is otherwise, as always, better to focus, instructively, on **preventive measures**[47] or on other measures similar in nature or scope. Only where the former or the latter may fail to be

[44] *And, as has been said already*, "on pretext of fighting terrorism and violent or highly organized crime, derogations to common law, and the adoption of particular methods of investigation, and not only of a reactive but also of a preventive nature..." *are occurring* "*[which]* tend to become the norm. Well, we are witnessing, more than just a generalization of exceptions to common law, the end of the state of law, as the structure of guarantees of individual freedoms, which characterizes the liberal criminal procedure in its democratic and liberal structure, is being questioned. One already accepts without winking, for reasons of collective security, that in fighting organized crime one may sacrifice the traditional guarantees of suspects and accused, and of possible and presumed innocents; ends would justify the means, even when the means are not those of yore, but are potentially equivalent since they now relate "only" to the restriction of freedom!" - *See Germano Marques da Silva*, Da «Processualização» do Direito Penal à Responsabilização dos Agentes da Justiça *in Direitos do Homem – Dignidade e Justiça*, Lisboa, *Principia, 2005, p. 86. Will one accept to put in question the sacred principle of confidence which enshrines the relation between the lawyer and the citizen? Or will one accept the destruction of the basic principle of professional confidentiality, the cornerstone of the profession?*

[45] *One needs only to understand the spread of special rules with respect to certain types of crime, namely money laundering. Just as an example, see Law no. 101/2001, of 25 August, which approves the legal framework of concealed activities for the purposes of criminal prevention and investigation; Law no. 5/2002, of 11 January, which sets forth a special legal framework for the gathering of evidence, the break of professional secrecy and the loss of property in favour of the state; Decree-Law no. 93/2003, of 30 April, which regulates the conditions of access and analysis, in real time, of the relevant information for criminal investigation, and Law no. 65/2003, of 23 August, which approves the legal framework of the European arrest warrant. But if even here the issues of infiltration, risk of provocation, inverted burden of proof and loss of privacy worry us, what shall one say then of the attacks onto the principle of contradiction, the guarantees of defence and the privilege of the lawyer?!*

[46] "The lawmaker intends to impose a legal breach of professional confidentiality in relation to clients who are more or less swindlers, busy introducing dirty proceeds in the official circuit but does not do the same where the infringement of a minor of other crime of similar or higher social and moral weight is at stake*". This was a spontaneous grievance of our former President of the High Council, Alfredo Castanheira Neves.*

[47] *As examples of preventive action we have the Professional information and training; the establishment of strict definitions of functions; the drafting of individual conduct codes and company ethical code; the publication of general company or activity regulations; the carrying out of auditing and inquiries by internal and external entities, in a regular or exceptional basis.*

effective, shall the perpetrator of illegal acts be the object of several **suppressive measures**[48], in a legitimate way, adequately and proportionately,.

In this adverse context, the Proposal for a Third EU Directive[49] is now under discussion. This proposal has already given rise to a public statement from the CCBE – the *Position of the Council of the Bars and Law Societies of the European Union (CCBE) on the requirements on a lawyers to report suspicious of money laundering (Nov 2004)*[50] – which we transcribe hereafter.

The **Proposal for a Third EU Directive** mentions in its provisions both the independent legal workers and lawyers in particular (provisions 12[51] and 13[52]) and the services rendered in connection with counselling, legal representation or defence (provision 14[53]).

---

[48] As examples of repressive action we can enumerate the actual use of hierarchical prerogatives in management activity; the triggering of "preventive actions" in the strict sense of the word; disciplinary action; the request for the intervention of supervisory authorities or of professional associations; the demand of accountability from the commitment of minor offences; the demand of accountability under the civil law of contracts or torts; criminal prosecution.

[49] *It is possible to consult the document in its entirety (com2004_0448pt01.pdf) nat the site of the European Union* www.europa.eu.int.

[50] *It is possible to access the document (CCBE proposed amendments to the European Commission Proposal for a Third EU Directive on Money Laundering) at* www.ccbe.org. *(although the more modern version quoted under is not yet available). Quotations in footnotes 58 to 65 are from this latter document.*

[51] "Directive 91/308/EEC, as amended, brought notaries and independent legal professionals within the scope of the Community anti-money laundering regime; this coverage should be maintained unchanged in the new Directive; these legal professionals, as defined by the Member States, are subject to the provisions of the Directive when participating in financial or corporate transactions, including providing tax advice, where there is the greatest risk of the services of those legal professionals being misused for the purpose of laundering the proceeds of criminal activity."

[52] "Where independent members of professions providing legal advice which are legally recognised and controlled, such as lawyers, are ascertaining the legal position of a client or representing a client in legal proceedings, it would not be appropriate under the Directive to put these legal professionals in respect of these activities under an obligation to report suspicions of money laundering. There should be exemptions from any obligation to report information obtained either before, during or after judicial proceedings, or in the course of ascertaining the legal position for a client. Thus, legal advice should remain subject to the obligation of professional secrecy unless the legal counsellor is taking part in money laundering activities, the legal advice is provided for money laundering purposes, or the lawyer knows that the client is seeking legal advice for money laundering purposes"

[53] "Directly comparable services need to be treated in the same manner when practised by any of the professionals covered by this Directive. In order to ensure the respect of the rights laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Treaty on European Union, in the case of auditors, external accountants and tax advisors who, in some Member States, may defend or represent a client in the context of judicial proceedings or ascertain a client's legal position, the information they obtain in the performance of these tasks should not be subject to the reporting obligations in accordance with this Directive."

For our purposes now, the Proposal for a Third EU Directive defines in Article 2[54] its **scope of personal applicability** and, in Article 20[55] the **scope of the obligation to report**.

Thus, the proposed changes do not apparently put forward any relevant innovations[56], but they raise some pressing issues which I, for now, shall only enumerate, for the purpose of discussing them further later on.

Why is such an indeterminate and too-far-ranging clause being formulated with respect to the definition of the primary crimes which may be at the origin of money laundering transactions?[57]

[54] *"This Directive shall apply to the following institutions and persons: (...) (3) the following legal or natural persons acting in the exercise of their professional activities: (...) (b) notaries and other independent legal professionals, when they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assisting in the planning or execution of transactions for their client concerning the: (i) buying and selling of real property or business entities; (ii) managing of client money, securities or other assets; (iii) opening or management of bank, savings or securities accounts; (iv) organisation of contributions necessary for the creation, operation or management of companies; (v) creation, operation or management of trusts, companies or similar structures. (...)"*

[55] Article 20(1) sets forth that "In the case of the notaries and other independent legal professionals referred to in Article 2(3)(b), Member States may designate an appropriate self-regulatory body of the profession concerned as the authority to be informed in the first instance in place of the financial intelligence unit. In such case they shall lay down the appropriate forms of co-operation between that body and the financial intelligence unit.*" Article 20(1) establishes that* "Member States shall not be obliged to apply the obligations laid down in Article 19(1) to notaries, independent legal professionals, auditors, external accountants and tax advisors with regard to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings.*"*

[56] *On a prognosis judgement, it may be said that the national legislator, with respect to rules related to lawyers, shall not have to nor will change the law in force. But, obviously, that remains to be seen!*

[57] Article 3 (7):

Why does the proposal not define what independent legal workers are?[58]

"(7) "serious crimes" means at least: (a) terrorism; (b) any of the offences defined in Article 3(1)(a) of the 1988 United Nations Convention against illicit Traffic in Narcotic Drugs and Psychotropic Substances; (c) the activities of criminal organisations as defined in Article 1 of Joint Action 98/733/JHA (d) fraud, at least serious, as defined in Article 1(1) and Article 2 of the Convention on the protection of the European Communities' financial interests; (e) corruption; (f) all offences which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards those States which have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months".	"(7) "serious crimes" means at least: (a) terrorism; (b) any of the offences defined in Article 3(1)(a) of the 1988 United Nations Convention against illicit Traffic in Narcotic Drugs and Psychotropic Substances; (c) the activities of criminal organisations as defined in Article 1 of Joint Action 98/733/JHA (d) fraud, at least serious, as defined in Article 1(1) and Article 2 of the Convention on the protection of the European Communities' financial interests; (e) corruption; (f) all offences <u>which fall under the areas listed in (a) to (e) above</u> which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards those States which have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months".

Justification

The definition of serious crime given in the Commission's draft is unacceptable for two reasons.

First, the European judicial area requires homogeneity of the underlying offences. Some offences exist in some countries which do not exist in others, or the same offences are punishable by different penalties, some above the threshold of one year of deprivation of liberty and some below. It appears that the criterion of the penalty will not achieve harmonization of the national legislations, which is the aim of the Directive. Therefore, the references to 'all offences' should be changed.

Second, widening the scope of 'serious crime' to 'all offences' with such a low sentencing threshold threatens to overwhelm the system with potential reports, and to bring the antimony laundering framework into disrepute. There are traffic offences – such as drunken driving – which would be within these limits, which clearly cannot be either intended or sensible.

Therefore, to lessen the lack of harmonisation highlighted by the first objection to the current wording, and to remove altogether the absurdity highlighted by the second, it is proposed that the offences which should fall within the definition of 'serious crime' for the purpose of length of sentence should be those already listed under (a) to (e). This is in line with the Directive's aim of combating money laundering which funds terrorism, drug trafficking, fraud and so on, and not to bring all offences, including motoring, within it.

[58] Article 3(13) [new article]

"*<u>independent legal professional" means a member of a profession providing legal advice which is legally recognised and controlled, such as lawyers</u>*".

<u>Justification</u>

At present, the term "independent legal professional" is defined in the recitals (Recitals 13) but not in the body of the Directive. It is proposed that it should be defined in the Directive itself, for the avoidance of doubt, using the same languages as appears in Recital 13.

Why does it not clarify that the Third EU Directive is to be applied to independent legal workers in general and lawyers in particular exclusively with respect to the five typical activities described under Article 2/3-b), i) to v)?[59]

Why does it insist that lawyers should scrutinize activities which stand already under the scrutiny of others and which are therefore regulated by prudential rules and specific obligations, which discriminate even the lawyers themselves in actual situations, and which establish distinct, discriminatory and more serious criteria and a double and purposeless obligation to report?[60]

[59] Article 2 (1)
Add the following paragraph (amended wording from Article 20 (2), moved to Article 2):
"member States shall not apply the obligations laid down in this Directive to notaries and other independent legal professionals who are subject to the present Directive under Article 2§1 (3) (b) in the exercise of their professional activity subject to professional secrecy or legal professional privilege, in particular when in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial, administrative, arbitration or mediation proceedings, including advice on instituting or avoiding such proceedings, whether such information is received or obtained before, during or after such proceedings".
Justification
The ambit of the third Directive is strictly limited to lawyers as natural persons when they participate for their client or when they assist him/her in the planning or execution of transactions concerning five definite items (Article 2 (1) (3) (b). Therefore, lawyers should not be subject to due diligence or reporting of suspicious transactions falling outside the above mentioned ambit of the provision.
In addition, certain words have added to the carve-out for lawyers to bring the wording of the carve-out in line with the Forty recommendations of the Financial Action Task Force (FATF) on Money Laundering, since one of the reasons for the Directive in the first place is to bring EU legislation into line with the Recommendations.
The words added are, first, 'subject to professional secrecy or legal professional privilege, in particular', which has been added to reflect the last paragraph of FATF's Recommendation 16, which states clearly: 'Lawyers, notaries, other independent legal professionals, and accountants acting as independent legal professionals, are not required to report their suspicions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege'. Second, the words 'administrative, arbitration or mediation' have been added to the list of proceedings covered, since they are also covered in the FATF recommendations. If the Commission aims to reflect the Forty Recommendations, then it should be done accurately.
The amended wording of Article 20 (2) has been moved to Article 2 because it is felt to be confusing to have the ambit of lawyers reporting duties in two different places in the Directive.
[60] Article 2 (1) (3) (b)

Can, at any rate, the trust relationship between the lawyer and the customer be broken, and the consent to inform third parties be ignored, despite the fact that the supervisory body, in this case the President of the Law Bar Association, is not?[61]

(b) notaries and other independent legal professionals, when they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assisting in the planning or execution of transactions for their client concerning the:	(b) notaries and other independent legal professionals, <u>whenever payment is made in cash and in an amount of EUR 15 000 or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked, but only</u> when they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assisting in the planning or execution of transactions for their client concerning the:

<u>Justification</u>

The Directive applies to lawyers when they participate on behalf of their client in any financial or real estate transaction, or by assisting in the planning or execution of transactions for their client. This is regardless of whether a payment in made in cash and regardless of whether the amount is EUR 15.000 or more. To other persons trading in goods or providing services the Directive only applies if the payment is made in cash and in an amount of EUR 15.000 or more. The Directive therefore only applies, for example, to luxury goods if payment is made in cash or in an amount of EUR 15.000 or more. The buying and selling of real property or business entities or the managing of client money, securities or other assets by the lawyer, however falls in every case within the scope of application of the Directive, even if only EUR 1.000 is managed or if an agricultural crop land shall be sold for EUR 5.000. The amendment above brigs lawyers in line with the generality of service providers.

Indeed, in the opinion of the CCBE, the Directive should only to lawyers if the mentioned transactions exceed the amount of EUR 50.000 and if they are made in cash. There is no empirical evidence that money laundering appears particularly during the buying or selling of real property below the amount of EUR 50.000. The discrimination between lawyers or notaries on the one hand who are supposed to be particularly susceptible to money laundering and jewellers on the other hand is not justified. It seems incorrect to consider the profession rather than the real transaction to be crucial for scrutinising whether or not there are money laundering activities and obligations.

[61] Article 14:

"Third parties shall make information based on the requirements laid down in Article 7(1) (a), (b) and (c) immediately available to the institution or person to which the customer is being referred. Relevant copies of identification and verification data and other relevant documentation on the identity of the customer or the beneficial owner shall immediately be forwarded by the third party to the institution or person to which the customer is being referred on request.	"Third parties shall make information based on the requirements laid down in Article 7(1) (a), (b) and (c) immediately available to the institution or person lo which the customer is being referred. Relevant copies of identification and verification data and other relevant documentation on the identity of the customer or the beneficial owner shall/ immediately be forwarded by the third party to the institution or person to which the customer is being referred on request, save that this and the preceding paragraph shall apply to independent legal professionals only when their client has consented. "

Justification

The CCBE is opposed to this provision applying to lawyers in its present form, as a lawyer cannot be expected to pass on information without the permission of the client.

Why, for instance, is the exemption from the obligations to require identification and examination only considered with regard to financial institutions and why are no exceptions established also with regard to similar situations occurred with lawyers?[62]

Why is only a subjective judgement of suspicion required, which is therefore not claimable in court? Why has not, rather, an objective and reasonable judgement of suspicion, based upon typified clues, been set forth, so as establish an immediate obligation to report when it occurs?[63]

---

[62] Article 10 (1) (a):

1. *"By way* of *derogation from Articles 6, 7 and* 8(2) *Member States may allow the institutions and persons covered by this Directive not to apply customer due diligence in respect* of *customers who represent* a *low risk* of *money laundering*, such as: *(a)credit and financial institutions from the Member States, or from third countries provided that they are subject to requirements to combat money laundering consistent with international standards and are supervised for compliance with those requirements; "*	1. *"By way* of *derogation from Articles 6, 7 and* 8(2) *Member States may allow the institutions and persons covered by this Directive not to apply customer due diligence in respect* of *customers who represent* a *low risk* of *money laundering*, *such as: (a)credit and financial institutions* <u>*and independent legal professionals*</u> *from the Member States, or* from *third countries provided that they are subject to requirements to combat money laundering consistent with international standards and* are *supervised for compliance with those requirements*

Justification

This Article provides that the requirement to apply customer due diligence may not be applied to credit and financial institutions which are credit and financial institutions in another Member State or in a third country where similar anti money laundering procedures exist. However, this relaxation of the due diligence requirements is not extended to lawyers and law firms where they are acting on behalf of another lawyer or law firm in another Member State or in a third country. Apart from being discriminatory, it could be of practical significance as there will be occasions where in a referral situation a lawyer may only wish to act solely on behalf of the lawyer in the other Member State and bill that lawyer *I* client accordingly.

[63] Article 19 (1) (a):

1. Member States shall require the institutions and persons covered by this Directive, and where applicable their directors and employees, to cooperate fully: (a) by directly and promptly informing the financial intelligence unit, on their own initiative, where the institution or person covered by this Directive knows, suspects or has reasonable grounds to suspect that money laundering is being committed or attempted.	1. Member States shall require the institutions and persons covered by this Directive, and where applicable their directors and employees, to cooperate fully: (a) by directly and promptly informing the financial intelligence unit, on their own initiative, where the institution or person covered by this Directive knows, <u>reasonably</u> suspects or has reasonable grounds to suspect that money laundering is being committed or attempted.

Justification

It is believed that, for the first time, an EU money laundering Directive has introduced the word *"suspects"* into the main text by using the expression *"suspects or has reasonable grounds to suspect*'. It would appear that these are two mutually exclusive tests. It is believed that such a provision is at risk of being applied in an inconsistent manner. To

Why, finally, is the Proposal for a Third EU Directive not more assertive with respect to the compulsory nature (and not merely the possibility) of any exemption to the reporting obligation of lawyers and other members of professions providing legal advice within the scope of their own activity, that is, in the particular scope counselling, defence or legal representation?[64]

Member States are free to appoint an institution of self-regulation or not to[65] and to exempt members of legal professions and lawyers from the obligation to denounce their customers[66],

---

avoid unreasonable suspicions having to be reported, and to ensure that both tests are as objective as each other, or as much 50 as can be achieved, the word *'reasonably'* has been introduced before *'suspects'*.

[64] Recital 13

Where independent members of *professions providing legal advice which are legally recognised and controlled, such* as *lawyers, are ascertaining the legal position* of a *client or representing* a *client in legal proceedings, it would not be appropriate under the Directive to put these legal professionals in respect* of *these activities under an obligation to report suspicions* of *money laundering. There should be exemptions from any obligation to report information obtained either before, during or after judicial proceedings,* or *in the course* of *ascertaining the legal position for* a *client. Thus, legal advice should remain subject to the obligation* of *professional secrecy unless the legal counsellor is taking part in money laundering activities, the legal advice is provided for money laundering purposes,* or *the lawyer knows that the client is seeking legal advice for money laundering purposes*	*Where independent members* of *professions providing legal advice which are legally recognised and controlled, such* as *lawyers, are ascertaining the legal position* of a *client* or *representing* a *client in legal proceedings, it would not be appropriate under the Directive to put these legal professionals in respect* of *these activities under an obligation to report suspicions* of *money laundering. There must be exemptions from any obligation to report information obtained either before, during* or *after judicial proceedings,* or *in the course* of *ascertaining the legal position for* a *client. Thus, legal advice remains subject to the obligation* of *professional secrecy unless the legal counsellor is taking part in money laundering activities, the legal advice is provided for money laundering purposes,* or *the lawyer knows that the client is seeking legal advice for money laundering purposes*

Justification

The Commission claims that Recital 13 of the proposed third Directive is identical to Recital 17 of the second Directive. But this is not true, and the amendments in the two places indicated above do nothing more than ensure that Recital 13 of the new and Recital 17 of the old Directive are indeed identical. The words changed are important, because whereas professional secrecy or legal professional privilege were clearly protected under the old Recital 17, that wording has been softened to 'should' in the new, supposedly identical recital. 'Should' is not as strong as 'must'. It is believed that the issue is so important that it must continue to be protected by the 'must' and other change above.

[65] *That is, in conclusion, we cannot agree with the open wording of Article 20(1) of the Proposal for a Directive, which sets forth that* "In the case of the notaries and other independent legal professionals referred to in Article 2(3)(b), Member States may *[or not!]* designate an appropriate self-regulatory body of the profession concerned as the authority to be informed in the first instance in place of the financial intelligence unit. In such case *[if they so consider!]* they shall lay down the appropriate forms of co-operation between that body and the financial intelligence unit. *[our underlining and commentaries]*

[66] *We cannot agree either with the wording of Article 20(2), which regulates that* "Member States shall not be obliged to *[but may!]* apply the obligations laid down in Article 19(1) to notaries, independent legal professionals, auditors, external accountants and tax advisors with regard to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their

even under circumstances understandable by all. And this is a **danger** which it would be possible to avoid[67].

The absolutely lenient wording of the proposal is unacceptable. It does not even agree with the rationale laid down in its introductory part[68] and particularly with Article 47[69] of the Charter of Fundamental Rights of the European Union[70].

I put forward, therefore, the following simple suggestion for an amendment to Article 20(1) of the Proposal for a Third EU Directive — notwithstanding all alterations already proposed by the CCBE:

---

client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings. *[our underlining and commentaries]*

[67] *In particular when it is established that* "criminal sanctions should apply to natural persons who infringe obligations on customer identification, record-keeping and reporting of suspicious transactions for the purpose of money laundering, since such persons have to be regarded as participating in the money laundering activity." – *see consideration (8)(a)* in fine *of the Proposal for a Third EU Directive.*

[68] *We recall once again consideration (13) of the Proposal for a Third EU Directive, which reads that:* "Where independent members of professions providing legal advice which are legally recognised and controlled, such as lawyers, are ascertaining the legal position of a client or representing a client in legal proceedings, it would not be appropriate under the Directive to put these legal professionals in respect of these activities under an obligation to report suspicions of money laundering. There should be exemptions from any obligation to report information obtained either before, during or after judicial proceedings, or in the course of ascertaining the legal position for a client. Thus, legal advice should remain subject to the obligation of professional secrecy unless the legal counsellor is taking part in money laundering activities, the legal advice is provided for money laundering purposes, or the lawyer knows that the client is seeking legal advice for money laundering purposes." *And especially consideration (14), which refers that "*Directly comparable services need to be treated in the same manner when practised by any of the professionals covered by this Directive. In order to ensure the respect of the rights laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Treaty on European Union, in the case of auditors, external accountants and tax advisors who, in some Member States, may defend or represent a client in the context of judicial proceedings or ascertain a client's legal position, the information they obtain in the performance of these tasks should not be subject to the reporting obligations in accordance with this Directive." *[our underlining]*.

[69] *For our purposes now, the third paragraph of this Article establishes that* "Everyone shall have the possibility of being advised, defended and represented*". In fact, that will only be possible in practice if a legal framework is established which can allow the citizen to have absolutely confidence in his lawyer, so that he can tell him his most intimate deeds with no need to fear treason or reporting.*

[70] *Only people who tell the truth can and manage to get advice. And nobody is willing to tell anything which can lead one to search for counselling if one suspects, knows or fears that what one says is not subject to strict and absolute confidentiality. The obligation to report and the respect for the lawyer's role are therefore incompatible. Instituting the former would make the latter cease to exist. That is, creating an obligation to communicate suspicious transactions to someone who practices as a lawyer would mean eliminating the counselling and defence rights and would mean the end of legal counselling and of legal representation in court.*

> ***"In the case of the notaries and other independent legal professionals referred to in Article 2(3)(b), Member States shall designate an appropriate self-regulatory body of the profession concerned as the authority to be informed in the first instance in place of the financial intelligence unit. In such case they shall lay down the appropriate forms of co-operation between that body and the financial intelligence unit."***

I also suggest the following amended version to Article 20(2) of the Proposal for a Third EU Directive:

> ***"Member States may not apply the obligations laid down in Article 19(1) to notaries, independent legal professionals, auditors, external accountants and tax advisors with regard to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings."***

In conclusion,

> **The powers of the State, or the powers of States, must never extend in an unlimited and abusive way, to the extent that they may imply a break in terms both of professional confidentiality and of trust of a citizen in his lawyer – whether the latter is appointed by his client or *ex officio*, and whether he acts as a defender or simply a counsellor or a listener.**
>
> **Otherwise, they shall be infringing upon the unassailable *legal guarantee that confession be not obtained through a mediator, as against the temptation to as a result of security e police enforcement concerns*, and shall be violating the *right to intimacy*.**

But, above all, they shall deny the citizen the free, real and effective *possibility to obtain counselling, defence and legal representation in court*.

Carlos Pinto de abreu